No. 2846

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY ROSENFELD, as Sole Surviving Trustee of the Trust Created by the Last Will and Testament of John Rosenfeld, Deceased,
Plaintiff in Error,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue,
Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR

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The proposition involved in this appeal, is not as stated by counsel for plaintiff in error on page 2 of his opening brief, "Whether, under the terms of the last will and testament of John Rosenfeld, deceased, the 'value of the rights to receive the annual income' from certain contingent legacies for the period of eleven years * * * was the equivalent, for the purposes of taxation under the War Revenue Act of June 13, 1898, as amended and supplemented, of the 'value of the rights to receive

the annual income' for life''; but rather, whether, while under the terms of a will providing that the legatees are to enjoy the income from a trust fund for a period of eleven years, at the expiration of which trust period they are not only to continue in the enjoyment of the income thereof, but also come into possession of the corpus of the estate, the interest in the income vesting at the death of the legator is not a life estate in said income rather than an estate therein for the period of eleven years only.

The contentions of the parties to the suit were clearly set forth by the trial court in its opinion (Tr. p. 60), where it was said:

> ''The will of Rosenfeld creating a trust to continue for eleven years, during which period the beneficiaries were to receive the annual income, and at its expiration the principal or corpus of their respective legacies, plaintiffs contend that, under these provisions, the vested right of each subject to the tax was on the income for the definite term of eleven years; defendant, on the other hand, contending that the vested interest of each was to the income for life, since necessarily, under the terms of the will, the beneficiaries would have and enjoy the income not only during the trust, but thereafter during their lives. The latter is, I think, the correct construction.''

From the above language it cannot but appear that the said Court did not, as counsel for plaintiff in error on page 3 of their opening brief, state that he did, hold ''that the 'value of the rights to

receive the annual income' for eleven years should in effect, be treated as the right to receive the annual income for life."

John Rosenfeld's will provided for the creation of a trust fund, the income therefrom to be paid to the beneficiaries thereof by the trustees for a period of eleven years, it being further provided that:

> "At the end of the said period of eleven years or upon the death of the last surviving of my said children, whichsoever shall first occur, then the whole of the trust property remaining on hand shall be distributed in equal shares among my six children, Henrietta Rosener, Sarah Eppstein, Lucy Isabella Weill, Max L. Rosenfeld, Louis Rosenfeld and Henry Rosenfeld; no account shall be taken, or deductions made on account of said monthly payments, or any of them, having been made."

The value of the legacies referred to in the said will were at first assessed by the Collector of Internal Revenue at the clear value of $57,969.55 each, and he thereupon imposed a tax of $652.15 upon each one of the legacies upon the theory that the said legacies had vested in possession and enjoyment prior to the repeal, on July 1, 1902, of the Act of June 13, 1898, as amended by the Act of March 2, 1901. The trial Court and this honorable Court held that the legacies should not have been assessed in gross, the interest in the corpus being a contingent beneficial interest that had not vested prior

to the repeal of the Act. But this Court did hold that

> "The rights of the beneficiaries to receive the income of the legacies were rights which were vested at the time of the assessments which were made thereon, and were subject to the War Revenue Tax, and assessable, not upon the gross amount of the legacies, but upon the value of the rights to receive the annual income as determined in *United States* vs. *Fidelity Trust Co.*"

that is to say, by mortality tables.

On the former trial of the case, and on the appeal thereof, the question as to whether the vested right to the income from the corpus of the legacy was a life estate or an interest for the term of the trust, was not raised; it is before this Court now, for the first time.

On page 16 of his opening brief counsel for plaintiff in error sets forth two so-called cardinal rules of interpretation that, he alleges, should be kept in mind by this Court in determining the propositions herein involved; *first,* that in case of doubt or of ambiguity, statutes imposing taxes are construed most strongly against the Government and in favor of citizens or subjects, and that such statutes are not to be liberally construed; and *second,* that the practice of officials connected with any of the executive departments of the Government in applying certain laws and imposing taxes thereunder is persuasive as to the practical application of the law.

Answering these two propositions advanced by counsel, we desire to say first, that the construction of an act imposing taxes is not really involved here, but rather, the nature of the interest passing under the will of John Rosenfeld, deceased; and second, that counsel apparently did not consider the practice of officials of that executive department of the Government, the Department of Internal Revenue, so persuasive when they originally assessed the legacies in question in gross as vested in possession and enjoyment.

Counsel also argues on page 25 of his opening brief, that the will in the case at bar did not purport to give any of the beneficiaries a life estate or income for life. We contend that the said will not only gave to them an income for life, but more, as it provided that the said beneficiaries should have the income for life, and the corpus itself after the expiration of the trust period.

It will therefore be seen that our contention that the assessment in this case should be made upon the right to receive the annual income for life, rather than for the period of eleven years, is based upon the provisions of the will of John Rosenfeld, by the terms of which the legatees in question were, at the end of the trust period of eleven years, to receive equal distributive shares absolutely. They would, therefore, at the end of the eleven years, not cease to receive the annual income, but would receive *in addition* to that annual income, the principal

itself. We concede that anything more than the annual income which they might receive at the end of the trust period, would not be properly assessable until the expiration of the trust period as it would not "vest in possession or enjoyment" until that time. But we do contend that the right to receive the annual income did not, and could not, under the terms of the will, cease at the end of the trust period, but continued after that time without interruption; that the right to the income having already vested both in possession and enjoyment could not and would not revest in the legatee. Such case as this is distinguishable from one in which, at the end of the trust period, the right to receive the annual income might on the happening of a specified contingency, pass to some one other than the person entitled thereto under the terms of the trust. Here no such contingency appears. The right to receive the annual income is a right which vested in possession and enjoyment at the death of the legator, and which continues throughout the life of the legatee regardless of the trust period; the provisions of the trust did not limit the period of enjoyment of the income, but only postponed the right of the legatee to take possession of, and enter into the enjoyment of the principal or corpus of the legacy.

However difficult it may be for counsel for plaintiff in error to grasp the point which we make here, we cannot admit that our argument is

fatuous since the learned judge of the trial Court has seen fit to give it the honor of his approval.

We respectfully submit that neither in the case of *Vanderbilt* vs. *Eidman,* 196 U. S. 480, 49 L. Ed. 563, nor in *Herold* vs. *Shanley,* 140 Fed. 20, was the point for which we contend decided or even raised. In both those cases the tax was originally assessed on the corpus of the estate of the legatee which was not, by the terms of the will, to be received until the happening of a certain contingency. And the decision in each case was that the corpus of the legacy not having vested in "possession or enjoyment," could not be taxed under the Act of June 13, 1898, though technically the interest may have vested.

Neither decision is in any wise at variance with the position taken by the trial Court in the present case, and here contended for by defendant in error. It cannot be claimed that the income, the enjoyment and possession of which the legatees entered into prior to July 1, 1902, could, under the terms of the will of John Rosenfeld, ever be taken from them during their lives, or that their enjoyment and possession of same would be interrupted except by death, that great contingency which might perhaps interrupt the enjoyment thereof within a period of eleven years, and which no one could foresee. But by the use of mortuary tables the probability of life of each legatee was estimated as

nearly as human minds could compute it and no injustice could result to the legatees thereby.

On page 54 of the Transcript of Record appears the result of the computation of the life interests of the legatees of the estate of John Rosenfeld, deceased, which we respectfully urge shows the tax which should have been assessed and collected, to-wit, $2,480.71. We respectfully urge that the judgment of the trial Court should be affirmed.

Respectfully submitted,

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